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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 74 OF 1979

COR: THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE CARBERRY, J .A.
THE HON. MR. JUSTICE WHITE, J.A.

BETWEEN	DESMOND THOMPSON	PLAINTIFF/APPELLANT
AND	REVERE JAMAICA LIMITED	DEFENDANT/RESPONDENT

W. B. Frankson, Q.C., for Plaintiff/Appellant.

W. A. Scholefield for Defendant/Respondent.

January 20, 21; February 7; May 11, 12, 1983;
March 29, 1985

WHITE, J.A.:

This appeal arose out of the dismissal of the claim by the plaintiff appellant that the defendant respondent was negligent and in breach of statutory duty to provide safe premises. Ross, J. (as he then was) expressed the view that "on a balance of probabilities the plaintiff has failed to prove his claim against the defendant."

The appellant, who was employed to the respondent, was injured on the 16th October, 1972, when he fell in the bathroom supplied by his employers, as he was about to take a shower after his day's work. This shower was provided by the respondent in fulfilment of the duty and responsibility cast upon it by the Factories Regulations 1961, originally made under the Factories Law, Cap. 214, but continued by the provisions of the Factories Act. That duty and responsibility is set out in Regulation 68:

> "There shall be provided and maintained for the use of persons employed adequate and suitable facilities for washing which shall be separate for each sex and shall include basins, soap and clean towels."

The statement of claim alleged, inter alia, that -

> "The plaintiff was in the act of adjusting the temperature of the water when he stepped on the board provided for the bathers, and due to the slippery condition of the bath he slid and fell on his back."

He became unconscious, and he later discovered that he was injured in that fall. After regaining consciousness, he could not move his right hand. This necessitated medical treatment, and there was a consequent period of incapacitation. On the basis of this small area of fact, the plaintiff contended that -

> "It was a term of the said contract of employment between the plaintiff and the defendant for the defendant to take all reasonable precautions to keep and maintain sanitary surroundings for the use and benefit of its employees whilst engaged upon the said premises, not to expose or risk damage or endanger (sic) or injury of which they knew or ought to have known to provide and maintain adequate and suitable sanitary conditions for the usage of its employees."

Undeniably, what the learned trial judge therefore had to decide was whether the respondent had breached its duty as imposed by the regulations, either because it did not provide adequate and suitable facilities, and/or having provided adequate and suitable washing facilities, the respondent failed to maintain these facilities adequately and suitably. It is clear that this was the complaint of the appellant not only in the statement of claim but also in his evidence. Indeed, after considering the evidence on this aspect, the learned trial judge opined:

> "Looking at all the evidence of the plaintiff as well as the defendant I am unable to say on the evidence how the plaintiff suffered his injury as there are two versions before this Court. I am inclined to accept the evidence of the defendant that the bathroom was kept in a reasonably good condition ....."

Before this court, Mr. Frankson argued for the appellant, that although the issue raised before us was on the findings of fact, this court should say that the judge was wrong in rejecting the assertion of the appellant that the wooden rack on which he was standing slipped on the day in question while he was standing on it, and in proper use of it. The sliding, he strongly urged, was due to the lack of proper maintenance and that this was a breach of statutory duty.

But surely, the nature of the bath area and the appliances

therein are important factors in determining whether the bath facilities were adequate as well as were properly maintained. According to the appellant, there were provided "little stools to stand on to have your bath." However, later on he elaborated that "the board thing I slipped on is about eight feet long. I never measured it." It is to be understood that he was alluding to one of the two shower or bath boards, the dimensions of which were given by Mr. Wallinston Hall, who was then responsible for the janitors and yard cleaning of the defendants' premises. They were each two feet wide by 12 feet long. Each bath board was made of 2" x 3" planks with 1" x 2" x 12 ft. wooden boards nailed down on top of the planks. The result would be a $1\frac{1}{2}$" space between the longer boards. These two shower boards ran the full length of the bathroom, from wall to wall, and, Mr. Hall added, they cannot shift, presumably, on their own motion. He said:

> "You have to draw it. We use two or three men to move each of these boards. There was one length of board for four showers."

The floor of the shower section on which these boards were laid was made of rough cast concrete, from which there were drain holes put in the sides of the wall to take off the water so that none collects and remains in the bath.

Significantly, the learned trial judge took into account the evidence of the day to day maintenance, and necessarily had to consider whether the practice of cleaning was effectuated on the 16th October, 1972. The plaintiff himself gave evidence that the baths were cleaned by janitors in the morning. On one of the two days which he spent there he saw one janitor between 10:00 and 11.00 a.m. with a scrubbing brush which he used to sweep out water. He did not notice if the janitor moved the boards nor was he able to say whether the place was clean after the janitor had finished. Nor was he able to say that the boards were taken out and scrubbed and put out in the sun to dry. On this last point, both witnesses for the defendant - Walliston Hall and Zue Alli - gave positive evidence that this was so. The boards had to be lifted by two or three janitors, and would be replaced between

2:30 p.m. and 3:00 p.m. The cleaning process was effected in part by a machine. Where the machine could not penetrate, e.g., the drains, a scrubbing brush was used.

As regards what was done on the 16th October, 1972, Mr. Zue Alli, the janitor, gave evidence that he did scrub the bath, and the boards, which were put outside to dry as usual. Whatever debris, viz., pieces of soap or paper, were on the floor were taken up and disposed of in the garbage bin. Additionally, Mr. Hall deponed to having visited the area twice on the 16th October, 1972. On the first occasion at about 10:00 a.m., he saw Mr. Alli at work there. Later that day at about 3:00 p.m., he visited the changing room and bath facilities. His purpose was to ascertain whether the area had been properly cleaned. He was so satisfied - the bath area was scrubbed and clean; the boards were properly scrubbed and clean. The judge's finding quoted above must be taken as the accepting of this evidence that the place was in a clean and non-dangerous condition at the time - 3:45 p.m. - when the plaintiff went to have his bath. To this extent the learned trial judge rejected the plaintiff's assertion that "there was soap all around and greasy rags the men generally use." Even if, as the plaintiff stated, in what the judge described as "an afterthought in order to create in the bathroom a situation conducive to a fall" - that others had been in the bathroom bathing before him, the question still arises whether the bath had been satisfactorily cleaned, and was in good working condition after the cleaning had been done by Alli. This consideration arises when it is borne in mind that the workers who came off work at 8:00 a.m. would have had a bath, and it is after this that the cleaning of the bathroom was done in preparation for the workers who come off work at 4:00 p.m. And, as Mr. Hall said, his visits at 10:00 a.m. and 3:00 p.m. were made for the specific purpose of seeing the condition of the bathroom in between shifts, and to satisfy himself that the condition of the bathroom showed that the work had been properly done.

On the evidence, Mr. Frankson submitted to the court that the respondent cannot escape liability by saying that they employed some men to see to the proper cleaning and maintenance of the bathroom. Because, he said, the obligation imposed is an absolute one, the evident consequences which flow therefrom therefore demanded a critical and careful examination of the evidence which the defendant tendered in the effort to show that the defendant had discharged its responsibility. The force of this submission was underlined by the quotation of certain remarks from judgments in three cases upon which Mr. Frankson depended. Gallagher v. Dorman, Long & Co. Ltd. [1947] 2 All E.R. 38 (C.A.), Potts (or Riddell) v. Reid [1945] 2 All E.R. 161 (H.L.) and Vyner v. Waldenberg Bros Ltd. [1945] 2 All E.R. 547 (C.A.) are those authorities. In those cases, the court's attention was adverted to a statutory duty as to safety, which was a continuing duty for the safety of the workman. In the first case, there was concern with a breach of regulations prohibiting the overloading of a crane or other lifting machine beyond the safe working load marked thereon. Vyner dealt with the incorrect adjustment of the guard on a circular saw, while Potts (or Riddell) considered the results of the disconformity of a working platform to the statutory provisions and regulations. Of course, in each case the plaintiff workman had suffered because of the breach of the statutory duty as to safety. In the last mentioned case, the employer was held liable although a fellow worker of the deceased had unauthorisedly inserted a seventh plank which, contrary to the safety regulations, extended far beyond the permissible point. The judgments in the House of Lords clearly indicated that the particular building regulations applied not only to the condition of the platform as erected by the employer, but was a continuing obligation prescribed for the safety of the workman while at work. It must be pointed out that in Potts (or Riddell's) case, in addition to the fact there was no authority for adding the seventh plank, the facts as rehearsed, would lead one to the conclusion that there was no supervision

of the workmen. Where the duty is absolute the employer cannot seek exemption from liability on the ground that the breach and its consequences was not due to any fault or omission of his.

In Vyner v. Waldenberg Bros. Ltd. (supra), the primary consideration was whether a workman who was operating a circular saw, could successfully complain of a breach of statutory duty because the guard was incorrectly adjusted. At page 549, Scott, L.J., stated (Letter C):

> "If there is a definite breach of a sefety provision imposed on the occupier of a factory, and the workman is injured in a way which could result from the breach, the onus of proof shifts on the employer to show that the breach was not the cause. We think that that principle lies at the very basis of statutory duty."

Significantly, Scott, L.J., pointed out that in that case -

> "Here not only had there been no express delegation, but the guard had regularly been maintained at a level far higher than it ought to have been, and the plaintiff had never been reprimanded, still less taught what was right. We think the defendants must be regarded as knowing quite well the height of 3½ inches above the table at which the judge finds the guard was regularly maintained.... The only real way of preventing accidents is to hold the occupier responsible under personal duty unless he proves clearly that he has delegated his duty to a definite person who knows how the guard to the machine and its safety appliances ought to be made and set. If the manager, foreman or other person fails in the duty, it is, of course, no defence for the employer sued by some other person; it is only if the person injured by the failure is himself the very person to whom the employer has delegated the duty, that the employer has a defence. In the last case the decision of this ?Court in the Smith v. Baveystock & Co. Ltd. applies."

In Gallagher v. Dorman, Long & Co. Ltd. (supra), Wrottesley, L.J., remarked that "there can be no doubt that where statutory duties are laid on an employer, such as those contained in s. 24 of the Factories Act 1937 (E), he remains liable in civil proceedings for damage caused to his employee generally by the breach of them, notwithstanding that he may have taken the steps indicated in s. 137 to have those duties carried out by properly instructed and competent subordinates. In this regard

the Lord Justice contemplated at p. 41H: "The word 'delegation' when used in connection with the statutory duty of the employer does not mean the same thing as employment....." He added:

> "The theory of delegation of a statutory duty is intelligible where the duty is a positive duty such as to keep the guard of a power saw in adjustment. In the case of a negative duty such as not to overload a crane, the conception of delegation presents considerable difficulty." (p. 42A)

What strikes the attention is that the above mentioned cases dealt with a situation in which the failure to carry out the statutory duty was in breach of a positive duty the competent performance of which demanded a strict adherence to the statutory standards. "Delegation" could not provide an effective answer unless the employer could show that the performance of the statutory duty was effectual in all the circumstances of the particular case.

In the case argued before us, the fact of delegation was a necessity, and the real question must be was the cleaning and maintenance adequately carried out, so that it can be said that the washing facilities were properly maintained?

As the judge pointed out, at first the plaintiff's evidence that he was the first workman to go to the shower after he came off work, is contradictory of his evidence under cross-examination that "on that day workers were in bathroom bathing prior to my going in. I met them coming out.... I knew others had been in there bathing before I went in to bathe. Place was wet. I met them coming out." The contradiction is heightened by the fact that he reached the shower at about 3:50 p.m. within five minutes of leaving his point of work. This was taken into account by the learned judge when rendering his judgment. Taking the appellant's estimate of the time between when he left his work point and when he went under the shower, it would appear that the inevitable conclusion therefrom is that there would not have been sufficient time to do the admittedly customary cleaning which was carried out after the shower was used by the 8:00 a.m. shift. Coupled with this is the evidence by the appellant himself

that the men were not allowed to bathe until after their work was finished, at which time they were allowed fifteen minutes after going off work within which to perform their ablutions. The sum total of these observations is that there was certainly nothing to discount the finding of the learned trial judge that he could not accept the evidence of the plaintiff as to the manner in which this bath-room was maintained.

Another of the factors leading to this conclusion was the relation by Mr. Hall of the report given to him by the plaintiff as to how he fell and sustained his injuries. On this I will quote from the judgment:

> " The plaintiff also gave his evidence in a straight-forward manner but there is a significant aspect of the plaintiff's evidence which is of some concern; in his Statement of Claim lodged in 1974 the plaintiff alleged in paragraph 3 in regard to the incident that 'he was in act of adjusting the temperature of the water when he stepped on the board provided for the bathers and due to the slipping condition of the bath he slid and fell on his back.'
>
> "This seriously affects the credit of the plaintiff.
>
> "This to my mind is quite a different account from that which he gave in evidence, what is more Mr. Hall related that on the day after the incident he saw the plaintiff and asked him what happened to him; 'he told me that he slide in the bathroom and lick his arm; I asked him how it happened; he stand up in the position right in front of personnel office and turned to the wall like he was turning on the shower, and he said when he turned it on, the water was hot and he stepped away from it and slide and lick his arm.'
>
> "Having seen Mr. Hall giving evidence I am satisfied that this is not a fabrication on his part. The plaintiff denied having any conversation with Mr. Hall after the incident - but it seems to me that this account reported by Hall is closer to the account set out in the plaintiff's Statement of Claim."

Mr. Frankson complained that this evidence was not evidence which should have been used in proof of the fundamental issues. While it is true to say that the material facts for the consideration of the court is that which is adduced before the court by viva voce examination, the fact of the matter is that the credibility of the appellant was in question, and the judge had

to evaluate this account by Mr. Hall so as to ascertain that if he accepted that the appellant did speak to Mr. Hall about his fall, how did the terms of the complaint accord with the allegation set out in the pleadings, and the evidence which he heard? He concluded that the evidence of the appellant could not be relied on .... and in our view the different statements of how the incident occurred are not mere verbal differences in relating the fall, and its surrounding circumstances.

After all, the fact of the matter is that if there is a breach of statutory duty it does not necessarily mean that the employee can ipso facto sue without proving his case. In our view the onus of proof rests upon him to make out that on a balance of probabilities the breach of duty caused or materially contributed to his injury.

We have considered the arguments propounded during the hearing of this appeal, and conclude that there is nothing in the judgment delivered in the court below which could conceivably lead this court to uphold the appeal. Accordingly, the appeal is dismissed with costs to the respondent to be agreed or taxed.